# No. 22,042

# United States Court of Appeals

## For the Ninth Circuit

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SIDNEY L. IRWIN, RAY LESTER LONG, SHERRILL LONG, ALAN DUANE LUTHER, MELVIN LONG, WAYNE KING and HARRY EDWARD ALLEN,

*Appellants,*

vs.

JOB CLARK, doing business as Oilfield Vacuum Service,

*Appellee.*

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## APPELLEE'S BRIEF

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### JURISDICTIONAL STATEMENT

This action arises by virtue of 29 U.S.C. Sections 0 219 under the Fair Labor Standards Act, a of the United States regulating interstate commerce, and jurisdiction is conferred by the provisions 2 U.S.C. 1337.

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### STATEMENT OF THE CASE

Appellants were truck drivers employed by appellee o was engaged in the oil field service business. enature of appellee's business was that employees

were only able to perform services for appellee's
tomers during periods when the peculiar necessi
of oil well production, drilling, or related activi
required the presence of equipment of the type ow
and furnished by appellee. There were, howe
periods of time during the day when it was n
likely that jobs would come in. (R. 97, Finding
10.) Appellants, as well as the remainder of ap
lee's employees, were subject to call for employm
24 hours a day. All of appellants were paid for
hours actually worked at straight time or overt
rates, in accordance with the provisions of the F
Labor Standards Act.

Appellants, in the District Court, sought comp
sation for "waiting time" for certain hours, Mon
through Friday, while they claimed they were on
pellee's premises waiting for jobs to come in and
accordingly dispatched. They claimed that they w
entitled to compensation for the "waiting time" in
much as they were required by appellee to be at
remain on the premises of appellee and, more
cently, that their being there was the result of "
nomic reality."

Appellee's contention was that the employees w
voluntarily on the premises "waiting to be hired" a
that they were not "hired to wait;" therefore,
waiting time was not compensable.

The testimony was in conflict regarding whet
(except for the admitted period of time) appella
were ordered or directed to appear at all, at a
specific time, or to remain on the premises for a

ecic period of time. The District Court found in is onnection, on disputed testimony, as follows:

"11. Except during the period as hereinafter et forth, plaintiffs were not required to report or work at any given time and were free to go nd come as they pleased, as long as they left a elephone number where they could be called in he event they were needed." (R. 97, Finding No. 1.)

pllee admitted liability for the period that appel- nt were directed by appellee to remain on the erises, i.e., from June 25, 1965, to July 5, 1965, ase of the peculiar circumstance of the dispatcher n outside the State of California. The District u found that the waiting time was not hours of rl and thus not compensable. (R. 96-101, Findings Iact and Conclusions of Law: Findings of Fact s.10, 11 and 18; Conclusions of Law Nos. 5, 6, 7, n. 9.)

Judgment was entered accordingly and appellants kto reverse that judgment.

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## ARGUMENT

### 1. THE ISSUE.

The issue to be determined by the above entitled n is whether, under the facts found by the Trial de under the law applicable, appellants are en- ld to compensation as "hours worked" for waiting n spent voluntarily on the employer's premises rig periods of time in which no services were or ul be performed on behalf of appellee's customers.

## 2. THE FORCE OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The principal issue presented to the trial co was whether or not appellants were required by rective of appellee to appear at appellee's prem at any particular time of day, and to remain th until any particular time of day. This issue was cided adversely to appellants. (R. 97, Findings Fact Nos. 10 and 11; R. 99, Conclusions of Law N 5, 6, 7, 8 and 9.)

On this issue, the Findings of Fact, Conclusions Law and Judgment of the Court are entitled to inferences reasonably to be drawn to support judgment and all intendments in favor of the ju ment.

*Falstaff Brewing Corporation v. Thompson,* F. 2d 301, 303 (1939, 8th Cir.):

> "In considering the question of the sufficie of the evidence, we examine it only for the p pose of determining whether or not there substantial evidence to sustain the verdict. (c tion) In considering it for that purpose, testimony in favor of plaintiff must be accep as true, and he is entitled to such reasona favorable inferences as may be fairly dra therefrom. . . ."

*Superior Ins. Co. v. Miller, et al.,* 208 F. 2d 7 703 (1953, 10th Cir.):

> "All the facts that plaintiff-appellee's [M ler's] evidence reasonably tended to prove m be assumed to have been established and all inf ences fairly deductible from such facts m be drawn in her favor."

Where there is substantial evidence in the record
upport the findings and conclusions drawn by the
ia court, the appellate court will not re-evaluate the
idnce.

*FCP* 52a:

". . . findings of fact shall not be set aside un-
ess clearly erroneous . . ."

*Fgles Const. Co. v. McLaughlin Const. Co.*, 205
2 637, 639 (1953, 9th Cir.):

". . . when a finding is attached as being un-
upported, the power of the appellate court be-
gins and ends with a determination as to whether,
onsidering the whole record, there is substan-
ial evidence which supports the conclusion
eached by the trier of fact. When two or more
nferences can be reasonably deduced from the
acts, the reviewing court is without power to
ubstitute its deductions for those of the trial
ourt."

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### 3. THE LAW OF THE CASE.

Frhaps the most succinct statement of the law ap-
cble to the case is contained in the 1944 Supreme
rt case, *Tennessee Coal & Iron Co. v. Miscoda*
*cl 4*, 4 Wage & Hour Cases, 294, wherein the court
d down the rule that working hours included all
n during which

". . . an employee engaged in physical or mental
exertion *controlled or required* by the employer
and *pursued necessarily* and *primarily* for the
benefit of the employer and his business."

The courts have consistently held that waiting t
is not compensable if the employees can use the w
ing time for their own purposes and are free to le
the premises.

*Gifford v. Chapman,* 6 Wage & Hour Cases 8
*Dumas v. King,* C.A. 8, 1946 (6 Wage & H
Cases 389);
*Jackson v. Mid-Continental Petroleum Co*
2 Wage & Hour Cases 540;
*Thompson v. Dougherty,* 1 Wage & Hour Ca
679;
*Bulot v. Freeport Sulphur Co.,* 2 Wage & H
Cases 476;
*Barker v. Georgia Power & Light Co.,* 2 W
& Hour Cases 486.

The testimony in the case was that the appella
"played cards," "drank coffee," "worked on their c
cars," "worked on a dune buggy," "went to ban
"went for coffee," "paid personal bills," "went hor
at various times, "generally wandered off leav
phone number," "slept," "went to barber shop," "t
care of personal business," "read magazines," "t
wife to doctor," "purchased gasoline," "went
hamburgers," "worked on his own ranch," "farme
(R.T. 58:15; 79:16-17; 99:21-22; 100:5; 195:19-
197:1-10; 285:7-8; 286:1-2; 290:17-25; 22:17-22; 2
1-4; 207:19-25; 208:1-2.)

It is submitted also that the interpretation a
bulletins published to the public generally by th
charged with the responsibility of enforcing the A

e ntitled to great weight. The Wage and Hour lnnistrator has issued Interpretive Bulletins de- ir, for the purposes of the Act, hours of work. ur 785, issued by the Administrator January 11, 61 as amended August 18, 1961, and August 10, 65 found in the Wage and Hour Manual at 93:101, ats in part at Section 785.14:

"Whether waiting time is time worked under he act depends upon particular circumstances. The determination involves 'scrutiny and con- truction of the agreements between particular arties, *appraisal of their practical construction f the working agreement by conduct,* consider- tion of the nature of the service, and its elation to the waiting time, and all of the cir- umstances. Facts may show that the employee vas *engaged to wait,* or they may show that he *vaited to be engaged.*' (*Skidmore v. Swift,* 323 J.S. 134 (1944).) Such questions 'must be de- ermined in accordance with common sense and he general concept of work or employment.' *Central Mo. Tel. Co. v. Conwell,* 170 F. 2d 641 C.A. 8, 1949).)" (Emphasis added.)

ıcfurther, at Section 785.17:

"An employee who is required to remain on all on the employer's premises or so close thereto hat he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."

> "Idle time, waiting to resume work during work day, may be excluded from working ti Waiting time will be considered off duty time not part of the employee's hours of work if h completely relieved of all duty and responsil ties and is permitted to leave the job and where he pleases."

In *Gifford v. Chapman,* 6 Wage & Hour Cases, the contractor had several drivers who fulfi schedules delivering mail under contract with federal government. The employees sued for wait time between trips. The court turned down this c tention, stating that they were "not hired to w but were "waiting to be hired."

If an employee is relieved from duty and can the time for his own purposes, it is not conside as hours worked. Conversely, if he is required to main on the premises and cannot use the time for own purposes, he must be paid as he is hired to w

See:

> *Thompson v. Dougherty,* 40 Fed. Supp. 278;
> *Gifford v. Chapman,* supra.

The facts in this case are similar to those of *Gore v. Patucah Manufacturing Co.,* 41 F. Supp. 980, 986, where the court said:

> "Here the employees were free to report or to report for work as they saw fit, to leave at a time without discrimination if they decided return for any work which was available, though they did stand and wait there was *no di to do so.*"

Te foregoing rules of law are established prin-
pl's upon which employers, since the Act, have
)vened their course of relations with their em-
oyes. They have the dignity of being the subject
' p.blication by the Wage and Hour Division of the
)vernment and the delineation by the Supreme Court
' te United States.

Te trial court applied the law of the case *as here-
abve set forth* to its findings of fact and concluded
atunder both, the time spent by appellants upon
)p lee's premises "waiting to be hired" was not
mensable. Under the facts, it was not "physical
rental exertion, *controlled or required* by the em-
oyr," nor was it "pursued *necessarily or primarily*
r he benefit of the employer and his business." It
as n the nature of the time spent in the *Gordon v.
at cah Manufacturing Co.* case, supra, i.e., although
eydid stand and wait, "there was no duty to do so."

Te economic reality of the time spent is no dif-
ret or of no greater or lesser legal consequence
a that spent by multitudes of employees "waiting
h hired" in the hiring halls of the construction
ac unions, shipping unions, longshoremen's unions,
adothers too numerous to name. For whatever the
urose of appellants' voluntary appearing and wait-
g,whether it be to secure a rush job, hours of work
ronally more favorable, or perhaps to augment
ei pay check, such motivations are not recognized
y he Act as those that are controlled or required
y ne employer or pursued necessarily and primarily
r he employer; rather, by their very nature they

exemplify those motivations which would be purs
necessarily and primarily for the benefit of ap
lants.

Notwithstanding the voluntary appearance of
pellants on occasions at appellee's premises, appe
sought to average the hours of work of their
ployees. (R. 97, Finding No. 10.) The efforts
appellee to average the hours of its drivers by call
up the man with the lowest hours is inconsistent w
the idea of being compelled to wait. While this
deavor could not be done with exactness because
the nature of the business and the overtime work
a review of the exhibits will indicate it was reas
ably successful.

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### 4. APPELLANTS' POSITION.

Appellants do not seriously contest the findings
the trial court that the waiting time was volunta
They do not seriously contend that legal preced
applied to the findings of the trial court establis
the waiting time as voluntary. They propound
unique and novel theory; they seek judicial cha
of a legislative act under which established rules
conduct of employer-employee relations have b
promulgated by decision and administrative ruling

By taking a word here and a phrase there, out
context from the court decisions, they attempt to su
port their novel theory. A carefull analysis of
cases cited by appellant reflects that they speak
the appellee rather than the appellants.

*Willing v. Dunbar Transfer and Storage, Inc.*, 7 abc Cases 64,599:

In this case,

> Employees were required to get their trucks rom the garage, check the gas and tires, drive to ne railway terminal, and wait for a loading pace, a freight car to be unloaded, or a checker o be available before they could begin loading neir trucks. They received no credit or compenation for time so spent, being credited only with me spent after they started loading."

Also:

> Defendant's officials had given employees instructions that on such assignments they were esponsible for defendant's trucks and their argos, and that they were not to stop or leave ne truck for personal purposes during lunch eriods."

e employees' activity above described was perrmed at the direction of the employer. It was yscal or mental exertion controlled or required by e mployer and it was pursued necessarily and prirry for the benefit of the employer. Such emoyes were truly "hired to wait." The case supports pellee's position, not appellant's.

*Westover v. Stockholders' Publishing Co.*, 237 F. 98:

This case holds that if employees are *terminated,* isplain from a standpoint of economic reality that e mployees lost their source of income and were, plain language, "out of a job." The issue in the

above cited case involved pay for work perfo
and had no relationship to waiting time.

*Rutherford Food Corp. v. McComb,* 331 U.S.

This case, under the Fair Labor Standards
applied to piece rate employees working as boner
a slaughter house and the question was whethe
employees were independent contractors or were
ployees subject to the record keeping rquirem
of the Fair Labor Standards Act. The court
held that they were employees and the court
cluded that under the underlying "economic rea
led to a conclusion that the boners were emplo
of the employer," thus subject to the Fair L
Standards Act. This was the only question decid

*Bumpus v. Continental Baking,* 124 F. 2d 54
551:

This case involved only hours worked and did
involve the question of waiting time.

*Goldberg v. Harold Gable,* 45 Labor Cases 41,3

The parties in this case agreed to a guarante
forty hours a week. Insofar as the forty-hour gua
teed work week is involved in this case, it is
course, distinguishable from the case at bar, inasm
as there is no such contractual relationship betw
appellants and appellee. Insofar as the case
cusses waiting time, however, it is four square for
appellee. The court found that the employer
quired all employees to report in to the office of
company at 7:00 o'clock in the morning" and
they could, and usually did, appear personally. In

there was no work, the men were allowed to and go as they pleased. The court found, as a ter of fact, that the employees were "waiting to nployed" with respect to such waiting time and not "employed to wait". As such, the time so was not compensable. The court found, as a ter of law, "That the time spent by the employees tween 7:00 o'clock a.m. and 3:00 o'clock p.m. at when there were no work jobs available to the many were not compensable hours . . ." Judgment srendered for the (employer) defendant in each stance and against the plaintiff.

The facts of the foregoing case are stronger than os of the instant case and yet the court found under w that the waiting time was not compensable.

There is no legal precedent cited for the theory of plaints. We have exhaustively researched the ir and find no cases supporting such a rule of law.

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## CONCLUSION

It is submitted that incentive, initiative, the desire better things, larger pay checks and the like, are metimes compelling motivations for the conduct of ployees. They certainly encompass the realm of conomic realities." However, such "economic realies" are not within the purview of the Fair Labor tandards Act insofar as they are claimed to nstitute a legal compulsion making non-working, nproductive, idle waiting time compensable. Em-

ployment arises from a contractual relationship
the mere desire to enter into a contract does
create one. The act does not support appellants'
sition nor does any other legal theory proposed.

It is respectfully submitted that the judgment
the District Court be affirmed and this appeal
missed.

Dated, Fresno, California,
February 8, 1968.

DOTY, QUINLAN & KERSHAW
By PAUL K. DOTY,
*Attorneys for Appellee.*

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CERTIFICATE OF COUNSEL

I certify, in connection with the preparation of
brief, I have examined Rules 18, 19 and 39 of
United States Court of Appeals for the Ninth
cuit, and that in my opinion, the foregoing brie
in full compliance with those Rules.

PAUL K. DOTY,
*Attorney for Appellee.*